No. 77356-4

SANDERS, J. (dissenting)—The majority bases its decision on the State's forensic expert who "repeatedly stressed, there is no difference between base methamphetamine and the salt form, other than their physical properties—which amounts to the difference between ice and water." Majority at 5 (citing Report of Proceedings (RP) (Vol. 5) at 46-49). I doubt the majority would be so indifferent to the distinction between ice and water were it poised to dive into a frozen lake.

The statute at issue prohibits the manufacture, delivery, or possession of methamphetamine—not the *salts* of methamphetamine—and does not state the salts of methamphetamine are the same as methamphetamine. Moreover a separate statute, not charged here, expressly criminalizes delivering salts of methamphetamine. Although the expert testified salt and liquid methamphetamine were different forms of the same substance, "[t]he issue is not whether a chemist might consider the two drugs to be essentially same. Rather, the issue is what is meant by the statutory term[s]." *State v. Halsten,* 108 Wn. App. 759, 763, 33 P.3d 751 (2001).

The former statute provides:

> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a

> controlled substance.
>
> (1) Any person who violates this section with respect to:
>
> . . . .
>
> (ii) amphetamine or *methamphetamine*, is guilty of a crime and upon conviction may be *imprisoned for not more than ten years*, or (A) fined not more than twenty-five thousand dollars if the crime involved is less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms . . . .
>
> (iii) *any other controlled substance classified in Schedule* I, *II*, or III, is guilty of a crime and upon conviction may be imprisoned *for not more than five years* . . . .
>
> . . . .

Former RCW 69.50.401(a)(1)(ii), (iii) (2002) (emphasis added).

Schedule II provides:

> (d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:
>
> (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;
>
> (2) *Methamphetamine, its salts, isomers, and salts of its isomers*;
>
> . . . .

RCW 69.50.206(d)(1), (2) (emphasis added).

By so defining delivery crimes, the legislature made a distinction between a person who delivers "methamphetamine," subject to a maximum sentence of 10 years, and one who delivers a Schedule II controlled substance, who is subject to a maximum sentence of 5 years. This distinction makes the difference between a 5 and 10 year maximum sentence.

Former RCW 69.50.401(a)(1)(ii) as written was unambiguous and rational. Drafting a statute is a legislative not a judicial function. *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). The court's role is to interpret the law as it is, or in this case, as it was written—not as it could or even should have been written. *Id*.

Attempting to engraft into the statute "salts," the majority states that the defendants in this case were asking the court to add onto the statute the word "base." Majority at 6. However, the majority's analysis ignores the canons of statutory construction and the reasoning based on *Morris*[1] and *Halsten,* and inevitably departs from "a long history of restraint" in compensating for perceived legislative omissions. *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982).

I. The Statutes Plainly Differentiate Between Methamphetamine and "Salts" of Methamphetamine

Issues of statutory construction are reviewed de novo to ascertain and carry out the legislature's intent. *New Castle Invs. v. City of LaCenter*, 98 Wn. App. 224, 228, 989 P.2d 569 (1999); *State v. Van Woerden*, 93 Wn. App. 110, 116, 967 P.2d 14 (1998). Intent is determined by looking at the language of the statute. *Van Woerden*, 93 Wn. App. at 116. If the language is plain, then it requires no construction. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) ("Plain language does not require construction."). We have held that "[c]ourts should assume the Legislature

[1] *State v. Morris*, 123 Wn. App. 467, 98 P.3d 513 (2004).

means exactly what it says"—even if the court disagrees with the result or finds the result distressing. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). *See also State v. J.P.,* 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *State v. Groom*, 133 Wn.2d 679, 689, 947 P.2d 240 (1997) ("[H]owever much members of this court may think that a statute should be rewritten, it is imperative that we not rewrite statutes to express what we think the law should be . . . . even if the results appear unduly harsh." (citations omitted)). Finally, this court has made it clear that courts "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

When defining drug delivery crimes, the legislature distinguished "methamphetamine" from other substances, which included methamphetamine's "salts, isomers, and salts of its isomers." *Compare* RCW 69.50.206(a) *with* RCW 69.50.206(d)(2).

Exclusion of language from one statute when included in others indicates an intent to do so. *See, e.g., Delgado*, 148 Wn.2d at 729; *City of Seattle v. Parker*, 2 Wn. App. 331, 335, 467 P.2d 858 (1970) ("Expressio unis est exclusio alterius. The expression of one thing is the exclusion of another."). By applying this canon, the plain language must mean only manufacture, delivery, or possession of the base form of methamphetamine, and not its salts, isomers, or salts of its isomers, is prohibited

under the former statute.

Thus reasoned the Court of Appeals Division Two in *Morris*, 123 Wn. App. 467, where the Court of Appeals held the plain language of former RCW 69.50.401(a)(1)(ii) was "unambiguous" and included only the liquid form of methamphetamine—but not its salts, isomers, or salts of isomers, which are governed instead by former RCW 69.50.401(a)(1)(iii).

The court held since the legislature had specified methamphetamine's "salts, isomers, and salts of its isomers" in Schedule II[2] but not in former RCW 69.50.401(a)(1)(ii), the language of former RCW 69.50.401(a)(1)(ii) was "unambiguous" and "covers only methamphetamine in its pure form, its base." *Morris*, 123 Wn. App. at 474-75. The court then noted even if the statute were ambiguous the result would be the same with application of the rule of lenity. *Id*. at 474 n.6.

Morris followed *Halsten*, 108 Wn. App. 759, which in turn relied on *Jackson*, 137 Wn.2d 712, which held the legislature's inclusion of certain language in statutes and the failure to include it in others compelled the conclusion that the Legislature made a deliberate choice, and it was not proper for the court to "read into" the statute that which is not there based upon the court's opinion of what would be sound policy.

[2] RCW 69.50.206(d)(2).

Id. at 724.

In *Halsten* the court determined pseudoephedrine hydrochloride was not pseudoephedrine—the possession of which was prohibited. *Halsten* concluded the legislature's reference to "salts" in one part of the code but not in another was clear and plain, and meant salts were not included in the latter. *Halsten*, 108 Wn. App. at 763. Division Two held the differing statutory language "demonstrate[s] that when the legislature intended a section to cover a drug and its salts, it was capable of saying so." *Id*.

The *Halsten* court also rejected the prosecution's attempt to have the court effectively add reference to salts into the statute based upon the theory that the Legislature probably meant to cover salts as well because "[t]he drafting of a statute is a legislative, not a judicial function," *id*. at 764, and warned: "[T]he court must resist the temptation to rewrite an unambiguous statute to suit its notions of what is good public policy." *Id*.

Similarly in *Jackson* this court applied the same fundamental principles to hold the legislature's inclusion of certain language in some statutes while failing to include it in others compelled the conclusion the legislature made a deliberate choice. *Jackson*, 137 Wn.2d at 724. We made it clear that it was not a proper judicial function to "read into" a statute that which the legislature did not include. *Id*. Moreover, we concluded even if the statute had been ambiguous, it would be

"required under the rule of lenity to adopt the interpretation most favorable to the defendant." *Id.* at 729. Applying *Jackson* we should likewise conclude salts, isomers, and salts of its isomers were not included in subsection (ii) of former RCW 69.50.401(a)(1).

The majority refuses to follow *Morris* and *Halsten* and instead engages in second-guessing what the legislature meant to say, concluding based on the expert's testimony the base and salt forms of methamphetamine are the same chemical substance, and "given the frequency with which the salt form is recovered by law enforcement, it is reasonable to *infer* that the commonly understood definition of 'methamphetamine' includes its salt form." Majority at 7 (emphasis added). I disagree. It is neither reasonable nor proper for this court to *infer* that the unqualified use of "methamphetamine" under former RCW 69.50.401(a)(1)(ii) includes all forms of the substance.

II. Courts Have Recognized Different Sentences for Different Forms

Other states impose different punishments for possession of different forms of the same substance. *See, e.g., United States v. Stevens*, 19 F.3d 93, 96 (2d Cir. 1994). In *Stevens* the defendant challenged the sentencing guidelines on equal protection grounds because they treated crack and powder cocaine differently, although each had the same chemical properties. The Second Circuit analyzed the sentencing scheme to determine whether it was rationally related to a government

purpose, *Stevens*, 19 F.3d at 96, and quoted *United States v. Haynes*, 985 F.2d 65, 97 (2d Cir. 1993):

> "A downward departure may not be predicated on the fact that penalties for cocaine crack are more severe than those involving cocaine. A departure on such basis is not permitted because the enhanced penalties for crack reflect a rational and specific congressional aim of deterring drug transactions involving crack. The purpose is obvious—crack cocaine is the most addictive and destructive form of cocaine, and because it is also cheaper it is more widely available and has had therefore a corresponding increase in usage."

Stevens, 19 F.3d at 97 (quoting *Haynes*, 985 F.2d at 70). The court found the United States Congress had a rational reason to differentiate between the two forms of the same substance:

> This passage makes plain our view that Congress had a valid reason for mandating harsher penalties for crack as opposed to powder cocaine: the greater accessibility and addictiveness of crack. *See also United States v. Buckner*, 894 F.2d 975, 978-79 & n.9 (8th Cir. 1990) (detailing congressional hearings in which legislators and drug abuse experts commented on the perils of crack versus powder cocaine).

Id. It buttressed its decision by pointing out that other circuits have upheld different punishments for different forms of the same drug:

> [W]e join six other circuits that have similarly held that the Guidelines' 100 to 1 ratio of powder cocaine to crack cocaine has a rational basis and does not violate equal protection principles. *See United States v. Reece*, 994 F.2d 277, 278-79 (6th Cir.1993) (per curiam); *United States v. Williams*, 982 F.2d 1209, 1213 (8th Cir.1992); *United States v. Frazier*, 981 F.2d 92, 95 (3d Cir.1992), *cert. denied*, [507 U.S. 1010,] 113 S. Ct. 1661, 123 L.Ed.2d 279 (1993); *United States v. Galloway*, 951 F.2d 64, 65-66 (5th Cir.1992) (per curiam); *United States v. Turner*, 928 F.2d 956, 959-60 (10th Cir.), *cert. denied*, [502 U.S. 881,] 112 S.Ct. 230, 116 L.Ed.2d 187 (1991); and *United States v. Lawrence*, 951 F.2d 751, 754-55 (7th Cir.1991). Although not directly referring to

> the 100 to 1 ratio challenged by Seagers, four other circuits have also rejected equal protection challenges to the enhanced penalty structure for crack offenses. *See United States v. King*, 972 F.2d 1259, 1260 (11th Cir.1992) (per curiam); *United States v. Harding*, 971 F.2d 410, 412-14 (9th Cir.1992), *cert. denied*, [506 U.S. 1070,] 113 S.Ct. 1025, 122 L.Ed.2d 170 (1993); *United States v. Thomas*, 900 F.2d 37, 39-40 (4th Cir.1990); and *United States v. Cyrus*, 281 U.S. App. D.C. 440, 890 F.2d 1245, 1248 (D.C. Cir.1989). *But see United States v. Willis*, 967 F.2d 1220, 1226-27 (8th Cir.1992) (Heaney, J., concurring) (criticizing 100 to 1 ratio); [*State v.*] *Russell*, 477 N.W.2d [886,] 888 [Minn. 1991] (invalidating Minnesota's differential penalty scheme for crack and powder cocaine under equal protection clause of Minnesota Constitution).

Id.

Contrary to the majority's position that the salt and base forms of methamphetamine are essentially the same, other courts have distinguished between these forms. For example, in *United States v. Cook*, 891 F. Supp. 572, 573 (D. Kan. 1995), the court was asked to determine by expert testimony the chemical nature of two different types of methamphetamine isomers. The court held:

> Both [isomers] are methamphetamines, but they stay molecularly different. They have all the same properties, except [one isomer] bends polarized light to the right and [the other isomer] bends polarized light to the left. These properties cause major differences in the effects produced by the substances. [One isomer] is a bronchial dilator, [the other isomer] is a central nervous system stimulant. Thus, the pharmacological differences in the two methamphetamines are significant.

Id. The two different methamphetamine isomers—L and D methamphetamine isomers—and their different effects, were also recognized in *United States v. Sieruc*, 1996 U.S. Dist. LEXIS 9495, at *3-4 (E.D. Pa. 1996). That court held:

> L-methamphetamine "produces little or no physiological effect when ingested" while D-methamphetamine "produces the physiological effect desired by its users." The *Bogusz* court noted that because of this difference, the Sentencing Guidelines treat L-methamphetamine much less severely than D-methamphetamine. Specifically, the reference to L-methamphetamine appears only in the Guidelines' Drug Equivalency Tables in the Commentary to section 2D1.1. In contrast, the Drug Quantity Tables, under section 2D1.1(c), refer only to "methamphetamine" and "methamphetamine (actual)". As a result, the Bogusz court concluded that the "references to methamphetamine and methamphetamine (actual) in the Drug Quantity Tables of section 2D1.1(c) refer solely to quantities of D-methamphetamine." The Court stated that the government has the burden of proving by a preponderance of the evidence the exact isomeric composition of the methamphetamine (D or L) involved.

Sieruc, 1996 U.S. Dist. LEXIS 9495, *3-4 (citations omitted) (quoting *United States v. Bogusz*, 43 F.3d 82, 89 (3d Cir. 1994)). We likewise should not conclude this is a distinction without a difference.

III. Under the Majority's Reasoning the Statute is Ambiguous

Given former RCW 69.50.401(a)(1)(iii), read in conjunction with RCW 69.50.206(d)(2), explicitly includes "salts" of methamphetamine while former RCW 69.50.401(a)(1)(ii) does not—if the latter is arguably susceptible to more than one reasonable interpretation, it is ambiguous. First among the canons of criminal statutory construction is the rule of lenity, which commands we strictly construe ambiguous statutes in favor of the defendant and against the State. *See State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2005); *United States v. Enmons*, 410 U.S. 396, 411, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973) (criminal statutes "must be

strictly construed, and any ambiguity must be resolved in favor of lenity").

Construing the statute in Cromwell's favor the prosecution would be required to provide evidence that the substance delivered was "methamphetamine." However, Dr. Suzuki testified unequivocally that the substances in this case were not methamphetamine but rather salts of methamphetamine. RP (vol. 5) at 46, 50-52.

Because "salts of methamphetamine" and "methamphetamine" are not treated by the legislature in the same way, under the plain language of the statutes and the rule of lenity (if the language isn't so plain), the prosecution did not—and could not—prove by sufficient evidence the charged crime. Therefore the conviction should be reversed and the case dismissed.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: